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David F. Anthony

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BOOK REVIEWS

DAVID F. ANTHONY*

THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67. EDITED BY DAN FENNO HENDERSON. Seattle: University of Washington Press, 1968, xv and 323 pp., indexed.

Dan Fenno Henderson is one of the most esteemed current contributors to the study of comparative law. In terms of background, areas of competence and contributions to American understanding of Japanese law, he occupies a position similar to that of Professor John N. Hazard in the field of Soviet legal studies. The title under consideration, most of which first appeared in the *Washington Law Review* in 1968, is still an important part of the explanatory literature regarding the Japanese Constitution of 1947 and its integration into Japanese society. Professor Henderson edited this symposium and contributed an essay on judicial review.

The component essays are divided into four categories. In the first section, John Maki deals with general problems and achievements in integrating the new constitution into Japanese society.¹ H. Fukui surveys the surge and retreat of revisionism in the first twenty years. The late Kenzo Takayanagi, Chairman of Japan's Commission on the Constitution from 1957 to 1964, provides an illuminating personal reminiscence of highlights of the Commission's deliberations. This is followed by an essay dealing with many specific criticisms which arose during the numerous and lengthy sessions of the Commission during its seven years of existence.² This is one of the most valuable sections of the volume for serious students of comparative law.

The second group of essays examines the new scope of judicial power and process under the Constitution. Professor Henderson's essay on the profound changes wrought by separation of the courts from the executive branch, the establishment of the supremacy of the courts, and the crucial authority given to the Supreme Court is the first essay in this section. Although much additional experience has accrued since the writing of this essay, the reader is pro-

*David F. Anthony, currently Chairperson of the International Studies Department and Professor of Asian Studies at Randolph-Macon Women's College, is past regional president of the Association of Asian Studies. Co-author of *THE UNITED STATES AND JAPANESE POLITICAL RELATIONS* (1968), Professor Anthony has written articles for numerous professional journals.

1. Since publication of *JAPANESE MILITARISM* (1945), Professor Maki has been one of the most productive and lucid scholars of Japanese government and politics. This essay conforms to his usual high standards.

2. The Commission held 131 Plenary meetings, 324 committee and sub-committee sessions and 55 public hearings between August 13, 1957 and July 3, 1964.

vided with valuable specific examples of the growth of case law in the new Japanese system and some Japanese perspectives on the role of the Supreme Court which differentiate it from the American model. The former Chief Justice of the Supreme Court, Kisaburo Yokota, further clarifies perspectives of the Supreme Court which make it qualitatively and functionally distinct from the United States Supreme Court in his essay on political questions and judicial review. The examination of the issue of treaties and the Constitution by Professor Isao Sato of Sophia University casts considerable light on a unique problem in the post-war courts that stems from the extreme political considerations of the post-war treaty settlement. At the same time, it is clear that the Constitution reflects a strong determination to accord respect to the principles of international law. The final essay in this section, by Professor Ichiro Ogawa of Tokyo University, discusses judicial review of administrative actions. It examines a fundamental characteristic of the new Constitution involving the shift from an 'administrative state' to a 'judicial state'. His discussion focuses on the Administrative Litigation Law of 1962. Professor Ogawa illuminates the tension between administrative process and judicial review, which will remain unresolved for some time.

The third section deals with problems of balancing individual liberties and the public welfare. Professor Lawrence W. Beers of the University of Colorado introduces this series with a discussion of the public welfare standard and freedom of expression. In discussing this issue, he notes that it is necessary to confront deeply ingrained cultural attitudes which have strong and ancient roots in the history of the Japanese people. Japanese solutions to the conflict between individual rights and public welfare are somewhat different from those in the West due to a strong sense of national cultural unity, a strong emphasis upon responsibility in traditional ethics, and a proclivity to 'groupism'. A more concise explanation of the Japanese cultural matrix would have made this essay more valuable to the average reader. In the next essay Professor Nobusike Ukaï of Seikei University and Professor Nathaniel L. Nathanson of Northwestern University collaborated to analyze the question of protection of property rights and due process of law. This will be an area of significant activity in Japanese courts in the future. Not only do the courts face the constant problem of balancing free competition and social justice, but the extremely limited area of usable land and the practical needs of economic and technological development will continue to produce conflicts which will require judicial resolution.³ It is still difficult to draw definitive conclusions in this area. The final subject covered in the third group of essays is the interesting issue of the 'right of silence'. This particularly significant subject for the

3. *E.g.*, note the recent conflicts surrounding the Narita International Airport.

cultural historian or the sociologist is discussed by B.J. George, Jr. of the University of Michigan.⁴

In the final section of the symposium, Professor Maki has provided an introductory guide to the reports of the Commission on the Constitution which was chaired by Professor Takayanagi between 1957 and 1964. This essay has already proven valuable to many Western scholars of Japanese Constitutional Law, and remains a valuable source of information.

For persons who lack an understanding of Japanese history and culture, this is a challenging set of essays. Although many of the contributors include clarifying remarks on the development of constitutional theory in Japan from the framing of the Meiji Constitution of 1889 to the present, more general features of Japanese experience and attitudes which are important are missing or underdeveloped in this collection. It is by its nature a rather specialized and highly professional symposium.

Despite the fact that the Government Section of the Supreme Command for the Allied Powers (SCAP) produced the first draft of the 1947 Constitution and resisted Japanese efforts to rewrite it, it is clear that the document now is firmly established, and threats to tamper with it are met by strong resistance.⁵ Even the controversial Article 9, the "Renunciation of War" article, has receded from its former position as the center of constitutional conflict. It was not merely the reaction to the disastrous defeat of World War II and its oligarchic leadership that facilitated Japan's general acceptance of the political and social changes required by the new constitutional framework. More significantly, it was centuries of experience with the importation and adaptation of foreign institutions and ideas, as well as approximately three quarters of a century of experimentation and application of European law in the Japanese environment.

Throughout all of its recorded history, beginning with the massive and deliberate importation of Chinese religion, philosophy, art, literature and governmental forms in the seventh and eighth centuries, Japan has had no problem retaining its unique cultural identity in the face of change. Until the development of modern military technology, Japan was far enough removed

4. Some linguistic problems arise which are not always evident in English translations. One example is the word "fureki", used in the framework of testifying against oneself. The Japanese term has a much broader meaning than the English expression. "Disadvantage" is perhaps a more accurate English translation, although even that is somewhat short of the mark.

The author points out that Article 280 of the Code of Civil Procedure permits a witness to decline to answer questions that may bring disgrace to himself or persons in certain specified relationships. This is another reflection of interesting and important cultural differences between Japanese and Western societies.

5. There is still a need for more scholarly work on the origins of the 1947 Constitution. See Moore, *Reflections on the Occupation of Japan*, 28 J. OF ASIAN STUD. 727-28 (1979).

from the continental powers to be safe from invasion, yet close enough to profit from cultural and economic exchange. Japan's insular territory, with limited arable land and resources and internal barriers which made unification difficult, spawned frequent civil warfare. The martial heritage gave Japan a respect and admiration for power: military, political or economic. Finally, the successful establishment of a stable imperial institution at the dawn of Japan's recorded history provided a psychological sense of unity buttressed by the beliefs of Shinto and a common sense of behavioral norms and ethical standards.

Japanese acceptance of such radical changes, such as the restructuring of its constitutional law by an alien authority, was also facilitated by an awareness of the continuity and strength of their social traditions. Professor Chie Nakane throws considerable light on this in her very influential *Japanese Society*:

The persistence of social structure can be seen clearly in the modes of personal social relation which determine the probable variability of group organization in changing circumstances. This persistence reveals the basic value orientation inherent in society, and is the driving force of the development of society. Social tenacity is dependent largely on the degree of integration and the time span of the history of a society. In Japan, India, China and elsewhere, rich and well-integrated economic and social development occurred during the pre-modern period, comparable to the 'post-feudal' era in European history and helped create a unique institutionalization of social ideals.⁶

Persistence of Japanese social structure did not mean that the social and political changes intended by the framers of the 1947 Constitution were effectively circumvented. It has simply meant that the inherent strength of traditional Japanese society has made it possible for the new constitutional order to be implemented in such a way that old and new ideas could be blended to create a new order better equipped to face the challenges of the latter part of the twentieth century.

The new structure was constructed from some old building blocks. One of the most important of these was the civil service bureaucracy. Maki points out in his essay that "It is impossible to understand the nature and operations of contemporary Japanese government without understanding both the past and present role of the bureaucracy".⁷ When the modern governmental structure was first created in the 1870's, a new bureaucracy had to be trained and organized as rapidly as possible. This became an elite segment of government and society. Its nature was determined in large part by an administrative

6. C. NAKANE, *JAPANESE SOCIETY*, ix (1970).

7. *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67*, 21 (D. Henderson ed. 1969) [hereinafter cited as Henderson].

tradition extending back over a thousand years to the Chinese tradition of an elite chosen from among the best Confucian scholars.⁸ Although the Japanese are not litigious, they are very legalistic, and the study of law is the most efficient route to a high position in the bureaucracy.⁹

One main point in Henderson's essay on judicial review is that under the pre-war regime "the ruling elite interpreted the constitution in fact, and the scholars developed its theory in textbooks and scholarly disquisitions. . ."¹⁰ The bureaucracy, through which the radical changes of the post-war structure were to be implemented, were heirs of the scholarly-legal tradition. They had been informed witnesses of the Minobe Affair of 1935¹¹ and were not strangers to constitutional theory. This is a unique feature of Japanese constitutional reform. Few other nations had the benefit of such a well prepared mechanism for implementing the changes required by a new legal framework.

Another distinguishing feature which eased the constitutional transition was Japan's extremely high educational level. The 99.9% rate of attendance for compulsory education today is not a recent phenomenon.¹² In his essay on constitutional style, Maki comments on the integration of constitutional studies into the educational system as a core feature of social studies in the middle and high schools.¹³ The general educational and informative impact of the mass media also aided the transition process.¹⁴ Japan's three major daily newspapers have an average circulation of over four million. This enormous readership illustrates the informational impact of the Japanese press, another advantage for implementing change.

A few of the outstanding features of the reforms of 1947 should be emphasized. Demoting the Emperor to a symbol of national unity with no real political power and little possibility of being manipulated for political purposes, solved a crucial problem of the pre-war constitutional order and has not created any serious problems for long-range acceptance. It could even be regarded as a logical extension of the arguments forwarded by Minobe in the 1930's which had the support of many in the intellectual establishment at that

8. Although they are not the best paid professionals in Japanese society, the bureaucracy still represents a prestigious career. Admission has always been highly competitive. Prior to the war it was estimated that 92 per cent of the top grades of civil service were graduates of the Law Department of Tokyo Imperial University.

9. For helpful analyses of the bureaucracy, see C. YANAGA, *JAPANESE PEOPLE AND POLITICS*, (1956); and *BIG BUSINESS IN JAPANESE POLITICS* (1968).

10. Henderson, *supra* note 7, at 115.

11. For thorough analyses of the constitutional crisis of the 1930s see F. MILLER, *MINOBE TATSUKICHI: INTERPRETER OF CONSTITUTIONALISM IN JAPAN*, (1965) and R. MINEAR, *JAPANESE TRADITION AND WESTERN LAW: EMPEROR, STATE AND LAW IN THE THOUGHTS OF HOZUMI YAT-SUKA*, (1970).

12. These statistics deal with ages 6-15.

13. Henderson, *supra* note 7, at 26-28.

14. For a discussion of the effectiveness of the Japanese press see III A. TSUJIMURA & W. ACADEMIA, *JAPAN ECHO* (1976).

time. The new status of the Emperor gradually gained broad acceptance. Even the Communist Party failed to raise serious objections. The centralization of power in the Diet, with the Prime Minister elected by the Lower House, brought to an end arbitrary appointments to leadership by a select few. Placing the newly created Supreme Court at the apex of the judicial system, protected from Executive interference, with power to rule on the constitutionality of laws and administrative actions was also crucial. The lower courts, which also were given that power, have rendered most constitutional judgments in the post-war legal system. As Henderson notes, this is the crux of the great change which gave the new constitution its justiciable character.

The scope of the Supreme Court in the new Japanese order is not by any means a carbon copy of the United States. In a landmark 1952 decision, *Suzuki vs. Japan*, it was determined that the Supreme Court would rule on specific controversies rather than abstract constitutional issues¹⁵. Although opinions differ as to the significance of this decision, the Japanese Court does play a less activist role than the United States Supreme Court in the promotion of social change.

The muted role of the courts in Japan is due to cultural and structural characteristics. There are only 1/15th as many lawyers per capita in Japan as in the United States. The majority of disputes which clog the dockets of American courts would never come to trial in Japan. Furthermore, the Japanese do not employ the jury system. From their point of view, it seems logical that one must have a weak case to place it in the unpredictable hands of a jury. Besides, under Confucian principles, if one pleads guilty an attitude of contrition is likely to mitigate the penalty.¹⁶

Finally, an extremely important characteristic of Japanese justice is that conciliation is preferred to confrontation. In civil disputes a mutually respected third party is usually asked to enter the situation. His decision is normally excepted even though one of the parties may not be entirely pleased. According to strong Japanese traditions, the mediator accepts the responsibility of considering the best interests of both parties. Another manifestation of this characteristic is found in the Japanese attitude towards contracts. In the Western view a contract implies a "right" on the part of both parties to demand specific performance from the other. It is an agreement often entered into in a severely calculating manner and involving detailed guarantees of performance. In the Japanese view, a contractual agreement is entered into only as the consequence of prolonged discussion, amenities and mutual assessment. The important ingredients are honor and trust, the surrounding cir-

15. See Henderson, *supra* note 10, at 121.

16. An interesting side-effect is that public prosecutors have a remarkable 99 percent record of convictions, since they do not bring charges without very substantial evidence and they are able to make a reasonably accurate assessment of the attitude of the judge when they bring a case to trial.

cumstances, moral and social obligations, human feeling (ninjo), friendship (yujo) and sincerity (magokoro). These factors are more important than the details of the agreement itself in ideal Japanese contractual relationships.¹⁷

The volume of essays which Professor Henderson and his colleagues have produced is an extremely valuable contribution to the growing body of literature on Japanese law, a field well worth the careful study of American scholars. Due to the rapidity and intensity of contemporary Japanese industrial development in a severely limited geographic region, many problems are reaching critical intensity earlier than they have in North America. Consequently, there are fields of law on Japan which provide valuable comparisons for us. Among them are environmental law, consumer protection, mass communications and forensic medicine.¹⁸ Japanese constitutional law in the first twenty years of the new Constitution received a massive transplant from the West. It is quite possible that the West may now learn something valuable in return from a study of the developing constitutional theories and practices of the Japanese.

17. This aspect of Japanese law has been very well presented in HENDERSON, *CONCILIATION AND JAPANESE LAW* (1965) and in a study by D. MITCHELL, *AMAERU: THE EXPRESSION OF RECIPROCAL DEPENDENCY IN JAPANESE POLITICS AND LAW*, (1976).

18. See Masami, *Postwar Japanese Law and Legal Studies*, 7 *THE JAPAN FOUNDATION NEWSLETTER* (1979).

IMANUEL WEXLER*

TRADE LIBERALIZATION, PROTECTIONISM AND INTERDEPENDENCE: GATT STUDIES IN INTERNATIONAL TRADE, NO. 5. BY RICHARD BLOCKHURST, NICHOLAS MARIAN AND JAN TUMLIR. Geneva: General Agreement on Tariffs and Trade, 1977, vii and 79 pp.

TRADE NEGOTIATIONS IN THE TOKYO ROUND: A QUANTITATIVE ASSESSMENT. BY WILLIAM CLINE, NOBORU KAWANABE, T.O.M. KRONSTJO AND THOMAS WILLIAMS. Washington, D.C.: The Brookings Institution, 1978, xiv and 314 pp., indexed.

Almost twelve years elapsed between the conclusion of the Kennedy Round of trade negotiations and the tentative conclusion of the Tokyo Round in the spring of 1979.¹ This was the longest period devoid of visible accomplishments

*Imanuel Wexler, currently Visiting Professor at Tilburg University (The Netherlands), is Professor of Economics at the University of Connecticut. He is the author of *FUNDAMENTALS OF INTERNATIONAL ECONOMICS* (1972), and of articles and reviews in professional journals. He is presently completing a book on the Marshall Plan.

1. It is so named because its initiation had been decided upon during a ministerial meeting which took place in Tokyo, September, 1973.